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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 515

A. W. HARTWIG AND JEFF TINGLE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the District of Montana, not reported, appear at R. 206–222. The opinion of the United States Court of Appeals for the Ninth Circuit (R. 386–392) is reported at 244 F. 2d 849.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1957 (Pet. App. 28). A petition for rehearing, timely filed, was denied on July 8, 1957 (R. 394). The petition for writ of certiorari was filed on September 30, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the repeal of the Veterans' Emergency Housing Act of 1946, 60 Stat. 207, by the Housing and Rent Act of 1947, 61 Stat. 193, 50 U. S. C. 1881 (Supp. V, 1946 ed.), relieved the petitioners of liability for defects and deficiencies in houses built with priorities-assistance granted pursuant to the 1946 Act, and sold before its repeal.

2. Whether petitioners are relieved of such liability by virtue of an FHA agent's approval of the project in a "Compliance Inspection Report" (R. 378).

STATUTES AND REGULATION INVOLVED

Pertinent portions of the Veterans' Emergency Housing Act of 1946, 60 Stat. 207, of Section 1 (a) of the Housing and Rent Act of 1947, 61 Stat. 193, 50 U. S. C. 1881 (a) (Supp. V, 1946 ed.), of the General Savings Statute, 1 U. S. C. 109, and of Priorities Reg. 33, as amended, 11 Fed. Reg. 4085 (1946), are set forth in the Appendix, *infra*, pp. 10–12.

STATEMENT

The United States instituted this action against petitioners to compel them to compensate certain purchasers for deficiencies in dwelling units constructed and sold by petitioners subject to the requirements of the Veterans' Emergency Housing Act of 1946, *infra*, and the Priorities Regulation, *infra*, adopted pursuant thereto.

The 1946 Act and the Regulation together provided that priorities in the allocation of building materials were to be granted to contractors who would build dwelling units for veterans at agreed maximum prices.

Petitioners applied for and received priorities from the FHA on or about July 1, 1946, for the construction of twenty-seven houses, at a maximum sales price of $8,000.00 each. The petitioners received building materials through use of the priorities, constructed twenty-five houses, and sold them at the maximum price. After these houses had been sold, the 1946 Act was repealed by the Housing and Rent Act of 1947, *infra*.

Thereafter, it was discovered that the purchasers were being charged for certain improvements which were intended to be included within the agreed price,[1] and that the houses failed to conform to specifications in various respects. The United States instituted the present action to compel petitioners to make appropriate compensation (or provide certain alternative remedies) to the purchasers. The district court ordered compensation (R. 223–226), and this order was affirmed by the court of appeals (R. 385–392).

ARGUMENT

1. (a) Petitioners' first and main argument is that the repeal of the 1946 Act by the 1947 Act extinguished the liability which had arisen under the earlier act. They argue that, since the 1947 Act provided specifically for the preservation of certain rights, the

[1] Petitioners contended below that these improvements were not intended to be included in the specifications which were the basis of the maximum price. This contention was rejected (R. 158) by a special master who had been appointed by the district court after the court of appeals had remanded for further findings. 209 F. 2d 604. The master's findings in this regard were adopted by the district court (R. 208) and affirmed by the court of appeals, and are not now in issue.

General Savings Statute, quoted *infra*, is by necessary implication rendered inapplicable. This argument has been rejected by various lower federal courts. *United States* v. *Carter*, 171 F. 2d 530 (C. A. 5); *United States* v. *Tyler Corp.*, 90 F. Supp. 395 (E. D. Va.); *Pruitt* v. *Litman*, 89 F. Supp. 705 (E. D. Pa.).[2] Similar arguments based on other statutes frequently have been rejected by this Court. *E. g.*, *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 553–555; *Great Northern Ry. Co.* v. *United States*, 208 U. S. 452.

(b) Each of the cases cited above has recognized and applied the principle that Congress, in the General Savings Statute, established the overriding policy that violators of statutes are not to be insulated from liability by expiration or repeal of the statute under which the violation accrued.[3] The impact of this

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[2] It should be noted that the petitioners' liability had crystallised prior to repeal of the 1946 Act because all the houses had been sold prior to repeal. Thus, this case is the converse of *United States* v. *Fortier*, 342 U. S. 160, where, in otherwise similar circumstances, the builder was absolved of liability because the houses had been sold *after* repeal. The opinion in that case plainly implies that if the houses had been sold before repeal the General Savings Statute would have preserved the right of action.

[3] There is no merit whatsoever to petitioners' suggestion that the General Savings Statute does not reach and preserve liabilities arising under regulations issued pursuant to statute. The language of this Court in *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 554–555, suffices to put any such contention at rest:

"The precise object of the general savings statute is to prevent the expiration of a temporary statute from cutting off appropriate measures to enforce the expired statute in relation to violations of it, *or of regulations issued under it*, occurring before its expiration." (Emphasis added.)

general policy can be avoided only by demonstration that Congress has expressly created an exception. No such showing can be made in this case. On the contrary, petitioners' argument, based on Section 1 (a) of the 1947 Act, is not of sufficient dignity to give rise to any difficult problem of construction. Even a superficial reading of that section clearly indicates that it does not deal with the same problem covered by the General Savings Statute.

The general statute preserves causes of action for "any penalty, forfeiture, or liability." *Infra*, p. 11. The proviso in the 1947 Act, on the other hand, preserves "* * * allocations made or committed, or priorities granted for the delivery, of any housing materials or facilities under any regulation or order issued * * *" under the 1946 Act. In other words, the General Savings Statute continues in existence the power to enforce against accrued violations of the 1946 Act and Regulation. The proviso in the 1947 Act preserves veterans' existing rights to priorities for building materials. Comparing these statutory provisions and their respective purposes, it can hardly be said that the necessary implication of the 1947 proviso is to render inapplicable the General Savings Statute.

Petitioners place great reliance on *Territory of Alaska* v. *American Can Co.*, 137 F. Supp. 181 (D. Alaska), affirmed, 246 F. 2d 493 (C. A. 9). That case involved property taxes which were to be collected by the Territory with the exception that taxes on property located within the bailiwick of "incorporated cities, school districts and public utility districts"

were to be collected and retained by those entities. 137 F. Supp. at 182. The taxing statute was repealed by an act which saved "any taxes which have been levied and assessed by any municipality, school or public utility district * * *." *Ibid.* The court considered that this provision was by clear implication exclusive of all other savings provisions. Thus, the court held that a general savings provision (similar to the General Savings Statute) could not be applied to preserve the right of the Territory to collect taxes which had accrued prior to repeal. To the extent that this decision is in conflict with the decisions of this Court and other federal courts, set forth on p. 4, *supra,* as to the overriding effect of the General Savings Statute, we believe it to be wrong. But, in any event, there is a vast difference between the *American Can* case and the case at bar in that the specific savings provision considered in the former case dealt with the same subject matter (the preservation of liability for taxes) to which the plaintiff sought to apply the general provision, whereas, as we have demonstrated (p. 5, *supra*), the specific provision in the instant case is unrelated to the matter to which the general provision has been applied.

(c) Petitioners' assertion of a conflict between the decision of the lower court and prior decisions of this Court is also without foundation. In each of the two cases cited by petitioners it was urged, as petitioners now urge, that the General Savings Statute (now Section 109) had been rendered inapplicable because

of a specific savings clause in the repealing statute. But in one case, *Great Northern Ry. Co.* v. *United States,* 208 U. S. 452, the contention was *rejected* by this Court, as it has been by the lower court in the present case. And in the other, *Hertz* v. *Woodman,* 218 U. S. 205, a decision as to that contention was rendered unnecessary by virtue of a ruling as to a preliminary argument.

In the *Hertz* case, an estate tax had been imposed by statute. This tax was repealed by a statute which provided that taxes which had been "imposed" before repeal remained subject to collection. The defendant-executor had refused to pay the tax, arguing that although his decedent had died before repeal the tax had not been "imposed" because it was not payable until after repeal. Apparently it was further argued that, since the repealer had contained a specific savings clause, the general savings clause must be considered inapplicable. The present petitioners cite language in which the latter argument was considered. But the Court held that the tax in question had been saved by the specific provision in the repealer. Hence, the possible conflict with the General Savings Statute (the forerunner of Section 109) was eliminated.

In the *Great Northern* case, petitioners had been convicted of granting illegal rebates on freight charges. The statute under which they had been convicted had been replaced, after the rebates were granted but before indictment, by an act which provided:

> * * * That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in the courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law. [208 U. S. at 466.]

The Court rejected the contention that this provision necessarily implied that liability was preserved only as to matters then the subject of pending actions. It held that the General Savings Statute had properly been applied.

2. Petitioners' remaining contention is that they were absolved of all liability by a final "Compliance Inspection Report." (R. 378.) This report indicates that "[b]uilding improvements [were] acceptably completed." Petitioners seem to argue that, since it was within the authority of the FHA inspector to make this report, the "acceptance" of the project is binding on the United States. The court of appeals held that "the United States was not bound by the unauthorized approval of its agent, who was bound to follow § 944.54 (e) of Priorities Regulation 33, requiring written approval upon application of the builder for changes in plans from those specified in the original application." 244 F. 2d at 854. See Priorities Regulation 33, § 944.54 (e), quoted *infra*. This conclusion follows from the well-established proposition that the United States is not bound by the unauthorized acts of its officers and agents. See, *e. g.*, *Federal Crop Ins. Corp.* v. *Merrill*, 332 U. S. 380; *Whiteside et al.* v. *United States*, 93 U. S. 247. Petitioners seek

to avoid the court's unassailable result by asserting that the court erroneously quoted (244 F. 2d at 850) the relevant regulation requiring written approval for deviation from the original plans. It is the petitioners who err, not the court. The petitioners rely on the regulation, Section 944.54 (e), as it appeared at 11 Fed. Reg. 601, 602. The amended regulation cited by the court appeared at 11 Fed Reg. 4085 on April 13, 1946—before the inspector's report and before any other act relevant to this case. Thus, the court of appeals was clearly correct in its conclusion in this regard.

Moreover, the court of appeals reasonably found that the purpose of the report was not to accept the project so as to relieve petitioners of liability for deficiencies, but rather merely to enable them to obtain FHA insurance (244 F. 2d at 854).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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SAMUEL D. SLADE,
Attorney.

NOVEMBER 1957.

APPENDIX

The Veterans' Emergency Housing Act of 1946, 60 Stat. 207, provided, in pertinent part, as follows:

* * * * *

SEC. 3 (b) Any regulation or order issued under the authority of this section with respect to housing accommodations * * * shall provide that no sale of any such housing accommodations shall take place until after the builder thereof has filed * * * a description of such accommodations, including a statement of the proposed maximum sales price * * *.

* * * * *

SEC. 4 (a) Whenever in the judgment of the Expediter there is a shortage in the supply of any materials or of any facilities suitable for the construction and/or completion of housing accommodations * * * he may by regulation or order allocate, or establish priorities for the delivery of, such materials or facilities in such manner, upon such conditions, and to such extent as he deems necessary and appropriate in the public interest and to effectuate the purposes of this Act.

* * * * *

SEC. 5. It shall be unlawful for any person to effect, either as principal or broker, a sale of any housing accommodations at a price in excess of the maximum sales price applicable to such sale under the provisions of this Act, or to solicit or attempt, offer, or agree to make any such sale. It shall be unlawful for any person to violate the terms of any regulation or order issued under the provisions of this Act. * * *

* * * * *

SEC. 8. As used in this Act—

(a) The term "maximum sales price" means the maximum price for which any housing accommodations the construction of which is completed after the effective date of this Act may be sold and includes the total consideration which may be paid by the buyer for such housing accommodations with accompanying land and improvements * * *.

* * * * *

Section 1 (a) of the Housing and Rent Act of 1947, 61 Stat. 193, 50 U. S. C. 1881 (a) (Supp. V, 1946 ed.), provides that all presently relevant sections of the Veterans' Emergency Housing Act of 1946, *supra*,

> * * * are hereby repealed, and any funds made available under said sections of said Act not expended or committed prior to the enactment of this Act are hereby returned to the Treasury; *Provided*, That any allocations made or committed, or priorities granted for the delivery, of any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and before the date of enactment of this Act, with respect to veterans of World War II, their immediate families, and others, shall remain in full force and effect.

The General Savings Statute, 1 U. S. C. 109, provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. * * *

Priorities Reg. 33, as amended, 11 Fed. Reg. 4085 (1946) was adopted pursuant to the Veterans' Emergency Housing Act of 1946, *supra*.

§ 944.54 (e) provided:

Construction of the project. A builder who constructs, converts, alters or repairs housing accommodations under this regulation must do the work in accordance with the description given in the application, *except where he has obtained written approval* for a change from the agency which approved the original application. [Italics added.]

§ 944.54 (g) (2) (ii) provided:

A builder must not sell a one-family dwelling built or converted under this regulation, including the land and all improvements (including garage if provided), for more than the maximum sales price specified in the application, as approved, including within this sales price the amount of any brokerage fees or commissions paid in connection with the sale, whether paid by the builder or by the purchaser.

U. S. GOVERNMENT PRINTING OFFICE: 1947